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9/10/2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

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UNITED STATES OF AMERICA, :
: 13-CR-362 (LDW)
v. : June 26, 2013
GERSHON BARKANY, : Central Islip, NY
Defendant. :
:-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR PLEADING
BEFORE THE HONORABLE ARLENE R. LINDSAY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government: LORETTA LYNCH, ESQ.
UNITED STATES ATTORNEY
BY: CHRISTOPHER CAFFARONE, ESQ.
ASSISTANT U.S. ATTORNEY
610 Federal Plaza
Central Islip, New York

For the Defendant: BRUCE BARKET, ESQ.

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Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE CLERK: Calling 13-CR-362, United States
2 v. Gershon Barkany.

3 Please state your appearances.

4 MR. CAFFARONE: Chris Caffarone for the
5 United States. Good afternoon, your Honor.

6 MR. BARKET: Good afternoon again, your
7 Honor. Bruce Barket for Mr. Barkany.

10 MR. BARKET: Yes, your Honor.

11 THE COURT: Swear the defendant.

12 (Defendant is sworn.)

16 Do you know that?

17 THE DEFENDANT: Yes.

18 THE COURT: You have that right. Are you
19 will, nonetheless, to let me take your plea?

20 THE DEFENDANT: Yes.

21 THE COURT: Judge Wexler being the judge who
22 will sentence you normally would take the plea, but
23 you're willing to let me do it?

24 THE DEFENDANT: Yes.

25 THE COURT: You had completed a form which

1 we reviewed yesterday. I just want to ask you, just
2 generally, are there any changes that you wish to make
3 to any of the answers you gave on that form?

4 THE DEFENDANT: Yes.

5 THE COURT: There is?

6 THE DEFENDANT: Yes.

7 THE COURT: What would that change be?

8 THE DEFENDANT: I was asked if I was
9 promised anything in return for my plea and yesterday,
10 I answered yes. Today, I switched my answer to no.

11 THE COURT: Well, I'm going to go through
12 the whole allocution with you. We need to do that.
13 But is there any -- of the written answers that you
14 provided, did you need to change any of the written
15 answers?

16 THE DEFENDANT: No.

17 THE COURT: Do you want to look at this
18 again?

19 THE DEFENDANT: No, thank you.

20 THE COURT: Well, we're going to go over it
21 anyway, orally.

22 Just tell me how old you are.

23 THE DEFENDANT: 28.

24 THE COURT: How far did you get in school?

25 THE DEFENDANT: High school.

1 THE COURT: Are you presently under the care
2 of any doctor psychiatrist?

3 | THE DEFENDANT: No.

4 THE COURT: Yes?

5 THE DEFENDANT: No.

6 THE COURT: What about medications, pills,
7 alcohol, anything in the last 24 hours?

8 THE DEFENDANT: No. .

9 THE COURT: Are you on any medications or
10 pills of any type, regardless of the 24-hour period?

11 THE DEFENDANT: No.

12 THE COURT: So you're not taking anything.

13 THE DEFENDANT: No.

14 THE COURT: Have you ever been hospitalized
15 or treated for narcotics addiction?

16 THE DEFENDANT: No.

17 THE COURT: Is your mind clear today?

18 THE DEFENDANT: Yes.

19 THE COURT: And you understand why you're
20 here?

21 THE DEFENDANT: Yes.

22 THE COURT: Mr. Barket, have you discussed
23 this matter with your client?

24 MR. BARKET: Yes, your Honor.

25 THE COURT: Does he understand the rights

1 he'd be waiving by pleading guilty?

2 MR. BARKET: I believe he does.

3 THE COURT: Is he capable of understanding
4 the nature of these proceedings?

5 MR. BARKET: I believe he is.

6 THE COURT: In your opinion, is he competent
7 to plead at this time?

8 MR. BARKET: I believe yes.

9 THE COURT: Mr. Barkany, I want to advise
10 you you still have the right to plead not guilty.

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: If you pled not guilty, under
14 the Constitution and laws of the United States, you
15 would be entitled to a speedy, public trial by jury,
16 with the assistance of your attorney to defend you in
17 that case.

18 Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: At the trial, you would be
21 presumed to be innocent, and it would be up to the
22 government to overcome that presumption and prove you
23 guilty by competent evidence and beyond a reasonable
24 doubt. You would not have to prove that you were
25 innocent because you are presumed innocent. If the

1 government failed in its proof, the jury would have a
2 duty to find you not guilty.

3 Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: What would happen at a trial is,
6 the government would have to bring its witnesses to
7 testify in your presence. Your attorney could object
8 to the evidence that the government offers. Your
9 attorney would be entitled to cross-examine the
10 government's witnesses and your attorney could offer
11 evidence on your behalf.

12 Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: Although because you're presumed
15 innocence, you would have absolutely no obligation to
16 present any evidence at all.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: If the government, after
20 offering its evidence, failed in its burden to prove
21 your guilt beyond a reasonable doubt, as you know, the
22 jury would have the duty to find you not guilty.

23 Do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: At a trial, you would have the

1 right to testify if you wanted to do that, but you
2 couldn't be required to testify because you have the
3 right not to incriminate itself. That's a
4 constitutional right that you possess.

5 Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: So if you decided not to
8 testify, the Court would instruct the jury that they
9 could not hold that decision against you in their
10 consideration of the verdict in the case.

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: But you plead guilty and the
14 Court accepts this plea, you'd be giving up the
15 constitutional rights to a trial, the presumption of
16 innocence, the right not to incriminate yourself, the
17 rights that we've discussed. There would be no further
18 trial of any kind and no right to appeal or
19 collaterally attack at any time the question of whether
20 or not you're guilty.

21 Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: And the other aspect of this is,
24 as a consequence of an agreement that you have with the
25 government, which we're going to discuss in a moment,

1 you've also given up the right to appeal the sentence
2 of the Court, to the extent that the sentence is 121
3 months or less.

4 Do you remember that?

5 THE DEFENDANT: Yes.

6 THE COURT: So as a hypothetical, if Judge
7 Wexler sentenced you to 120 months in prison, you would
8 have absolutely no right to appeal any component of
9 this case, meaning the verdict of guilt or the sentence
10 of the Court.

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you also understand that if
14 you plead guilty, I'm going to be asking you questions
15 about what you did, in order to satisfy myself that you
16 are in fact guilty of the crime that you wish to plead
17 guilty to. And in answering those questions, you'll be
18 giving up the right not to incriminate yourself.

19 Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: Are you willing to give up your
22 right to a trial and these others right that I've just
23 discussed with you?

24 THE DEFENDANT: Yes.

25 THE COURT: The government, I'm going to ask

1 once again to outline the plea agreement for the
2 record.

3 MR. CAFFARONE: Yes, your Honor. The plea
4 agreement -- the defendant will get coverage from the
5 government. The government agrees not to prosecute him
6 for check kiting as well as the wire/mail fraud that he
7 committed between January, 2007 and March 2013. In
8 addition, as your Honor noted, he has agreed to an
9 appellate waiver of 121 months.

10 The defendant also agreed to entry of a
11 money judgment in the amount of 62 million dollars,
12 less any monies or assets that are repaid to the
13 victims, so he agrees to forfeit 62 million dollars.

14 THE COURT: Mr. Barkany, I want to confirm
15 you read the plea agreement, correct?

16 THE DEFENDANT: Yes.

17 THE COURT: And you reviewed it with your
18 attorney before you signed it?

19 THE DEFENDANT: Yes.

20 THE COURT: And you understood what the plea
21 agreement provided?

22 THE DEFENDANT: Yes.

23 THE COURT: As we reviewed yesterday, I want
24 to go over the penalties that are associated with the
25 charge you're pleading guilty, which his the charge of

1 mail fraud or a violation of Title 18, United States
2 Code Section 1343, which carries a maximum term of
3 imprisonment of twenty years with a minimum term of
4 imprisonment of zero, a maximum supervised release term
5 of three years, to follow any term of imprisonment, a
6 maximum of \$250,000 or twice the gross gain or gross
7 loss of the offense, restitution, which is in an amount
8 to be determined by the Court, a \$100 mandatory special
9 assessment, as well as the criminal forfeiture which
10 the government has outlined.

11 One of the things we discussed yesterday and
12 I want to go over with you again is the sentencing
13 guidelines. Your sentence guidelines as calculated by
14 the government is an adjusted offense level of 30,
15 which carries a range of imprisonment of 97 to 121
16 months.

17 You're aware of that, correct?

18 THE DEFENDANT: Yes.

19 THE COURT: That's the government's
20 calculation and as I've already explained and will
21 explain again, just to make sure you're clear, that is
22 the government's best guess. That's all it is. It's a
23 guess.

24 And what will happen is, you're going to go
25 to Probation and Probation is going to do a full and

1 comprehensive review of your background and the
2 circumstances of this case. And they will do a
3 calculation of the guideline range that applies in your
4 case. It may be the same as the government's or even
5 your attorney. I'm not sure what your attorney has
6 told you but if your attorney has told you that he
7 agrees with the government, it's important that you
8 know that Probation is going to do their own
9 calculation and it may be similar to or different from
10 -- all of this information will go to Judge Wexler, who
11 will assess everything and make the final conclusion as
12 to what your guideline range is.

13 If Judge Wexler decides that your guideline
14 range is different from what's been estimated by your
15 attorney and the government, you do not have a basis to
16 withdraw your plea. In other words, don't rely on the
17 government's estimate or your own attorney's estimate,
18 because they're educated guesses at best.

19 Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: The one who is going to make a
22 decision about this is Judge Wexler, who will review
23 all the information, and it will be up to Judge Wexler
24 to decide what the sentence will be. He's not bound by
25 the guidelines. He could, because he has the

1 authority, decide that the guidelines should be
2 pierced, meaning he should go upward beyond what the
3 guidelines provide, or he could decide that they're too
4 severe and he could sentence you downwardly, meaning
5 less than what the guidelines provide.

6 Do you understand all that?

7 THE DEFENDANT: Yes.

8 THE COURT: At the end of the day, nobody
9 knows what your sentence is going to be. So to the
10 extent that you think you can rely on the estimate
11 provided by the government or even your own attorney,
12 I'm telling you that you can't because nobody is sure
13 what your ultimate sentence will be and what the
14 guidelines will provide.

15 Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: And if your sentence turns out
18 to be more severe than any calculation you've been
19 given or estimate you've been given, that will not
20 provide a basis for withdrawing your plea of guilty.

21 Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: One of the things that I've
24 already told you is, the government has to prove your
25 guilty beyond a reasonable doubt. Here's what they

1 have to prove: That between December, 2007 and March,
2 2013, that you knowingly and intentionally devised a
3 scheme and artifice to defraud investors by means of
4 intentionally false and fraudulent pretenses, and that
5 you transmitted or caused to be transmitted by wire
6 transfer across state lines matters that furthered the
7 scheme to defraud, and that part of this activity was
8 done in the Eastern District of New York.

9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you understand the charge
12 that you intend to plead guilty to?

13 | THE DEFENDANT: Yes.

14 THE COURT: And have you discussed that
15 charge with your attorney?

16 THE DEFENDANT: Yes.

17 THE COURT: Do you have any questions about
18 anything that we've discussed up to this point?

19 THE DEFENDANT: No.

20 THE COURT: Are you ready to enter a plea?

21 THE DEFENDANT: Yes.

22 THE COURT: Mr. Barket, do you know of any
23 legal reason why the defendant should not be permitted
24 to plead guilty?

25 MR. BARKET: No.

1 THE COURT: Mr. Barkany, are you satisfied
2 with your legal representation up to this point?

3 THE DEFENDANT: Yes.

4 THE COURT: Then with respect to the
5 information that was filed by the government, charging
6 you with a violation of Title 18, United States Code
7 Section 1343, what is your plea?

8 THE DEFENDANT: Guilty.

9 THE COURT: Are you entering this plea of
10 guilty voluntarily and of your own free will?

11 THE DEFENDANT: Yes.

12 THE COURT: Has anyone threatened or forced
13 you to plead guilty?

14 THE DEFENDANT: No.

15 THE COURT: Other than the agreement with
16 the government which we described on the record both
17 today and yesterday, has anyone made any promises to
18 cause you to plead guilty?

19 THE DEFENDANT: No.

20 THE COURT: Has anyone made any promise to
21 you as to what your sentence will be?

22 THE DEFENDANT: No.

23 THE COURT: Did you, as charged in the
24 information, on or about and between December, 2009 and
25 March, 2013, those being approximate dates, did you

1 knowingly and intentionally, within the Eastern
2 District of New York, devise a scheme and artifice to
3 defraud investors and to obtain money and property by
4 means of false and fraudulent pretenses, and did you
5 use wire transfers via the Federal Reserve network, to
6 execute that scheme to defraud?

7 THE DEFENDANT: Yes.

8 THE COURT: Those write transfers being in
9 the amount of 13 million dollars on June 14th, 2010, and
10 another wire transfer in the amount of \$500,000 on
11 about February 15th, 2013? Were those wire transfers
12 transfers you made or caused to be made in connection
13 with the scheme to defraud?

14 THE DEFENDANT: Your Honor, I don't recall
15 specific dates or amounts but I did in fact, on at
16 least one occasion engage in a scheme to defraud at
17 least one person out of money in the Eastern District
18 by telling them something that wasn't true and having
19 them send money over the federal interstate wire system
20 and it crossed through different states.

21 THE COURT: Was it within the time frame
22 that we described?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: So I want you to expand and tell
25 me in your own words what it is you did, how you

1 effected this scheme.

2 THE DEFENDANT: I told at least one person
3 that I was going to invest their money but did not use
4 the money as I represented to that person that I would.
5 Instead, I diverted those funds in other directions.

6 THE COURT: Well, what did you tell that
7 person? How were you going to use the money?

8 THE DEFENDANT: In one instance, I may have
9 represented --

10 THE COURT: You may have or you did?

11 THE DEFENDANT: I'm sorry. In one instance,
12 I would have represented to that investor that I was
13 going to utilize specifically his funds to invest in
14 project X. I would describe a transaction to him and
15 instead of doing so, I would either have -- I would
16 have not used it for that and used it for other things.

17 THE COURT: What was the name of that
18 investor?

19 THE DEFENDANT: John Doe 1 as know to the
20 government, let's say.

21 THE COURT: Did you know who the investor
22 was?

23 THE DEFENDANT: Absolutely, sure.

24 THE COURT: Who was the investor?

25 THE DEFENDANT: Can I ask my attorney a

1 question?

2 THE COURT: Sure.

3 (The defendant is conferring with his
4 attorney.)

5 MR. BARKET: Your Honor, I think that they
6 were put in as John Doe number 1 and number 2. They
7 don't want their names identified in a public filing.
8 The government knows them, we know them but we'd
9 rather --

10 THE COURT: Let me hear from the government.

11 Mr. CAFFARONE, is there any reason at this
12 point for them to remain undisclosed?

13 MR. CAFFARONE: Your Honor, the victims are
14 sensitive to their name being disclosed. They have
15 asked us not to include their name in court filings and
16 we've -- we've talked to the victims and, often times,
17 we have to talk sometimes to their counsel as well. I
18 think it has to do with the community that they're in.
19 They're very sensitive to their name being involved in
20 being defrauded.

21 I don't think it's -- obviously, the U.S.
22 attorney knows who the victim is. We've been in
23 contact with the victim. The defendant knows who the
24 victim is. For purposes of the allocution, I don't
25 think it's a necessary element to it and if we can

1 protect the victims' privacy, then I would ask your
2 Honor at least to agree to that.

3 THE COURT: Well, I'd be happy to -- then
4 with respect to John Doe 1, tell me what you did. I
5 need some specifics.

6 THE DEFENDANT: On at least one occasion, I
7 presented him with a set of information with regards to
8 a deal, telling him that he should invest him money in
9 that.

10 THE COURT: What kind of a deal was it?

11 THE DEFENDANT: A real estate transaction.

12 THE COURT: All right. So he gave you money
13 or John Doe gave you money thinking he was investing in
14 real estate, correct?

15 THE DEFENDANT: John Doe 1 gave me money
16 thinking that that money was going specifically to the
17 real estate deal that I represented to him.

18 THE COURT: All right. And where did these
19 conversations or where was this real estate located?

20 THE DEFENDANT: On one occasion, the real
21 estate was located in Manhattan.

22 THE COURT: All right. Where did you engage
23 in these transactions or discussions?

24 THE DEFENDANT: I was in the Eastern
25 District of New York at the time that I conversed with

1 John Doe 1 about that.

2 THE COURT: All right. And how much money
3 were you entrusted by John Doe to invest in that real
4 estate deal?

5 THE DEFENDANT: 14.5 million.

6 THE COURT: All right. And then what did
7 you do with the 14.5 million?

8 THE DEFENDANT: I used it for -- I diverted
9 it in other directions than where I represented
10 specifically to John Doe 1 that I was going to be using
11 it for.

12 THE COURT: So at no point did you use the
13 money, the 14.5 million, in accordance with what you
14 were telling John Doe, correct?

15 THE DEFENDANT: Not all of it.

16 THE COURT: What does that mean?

17 MR. BARKET: The actual transactions, Judge,
18 are not simple. What happened to the money after he
19 received it -- it got diverted to a variety of
20 different places.

21 THE COURT: I understood that. The simple
22 question I asked is, did you use any portion of the
23 14.5 towards acquiring the real estate you said you
24 were going to get for John Doe 1?

25 THE DEFENDANT: No.

1 THE COURT: Did you mislead him -- John Doe,
2 whoever the John Doe 1 is, did you intentionally
3 deceive him, that party, he or she? Did you take the
4 money with the intent to defraud him?

5 MR. BARKET: I'm sorry, Judge, could you
6 repeat the question?

7 THE COURT: Did you take the money, the 14.5
8 million from John Doe 1 with the intent to defraud him?

9 THE DEFENDANT: As defined under the current
10 federal statutes, yes.

11 THE COURT: Well, I'm not sure that your
12 definition of the current statute is the same as the
13 Court's. So please tell me, when you took the money
14 from John Doe, you told him you were going to put it
15 into a real estate deal, correct?

16 THE DEFENDANT: Yes.

17 THE COURT: When you took the money, did you
18 ever intend to put it into that real estate deal?

19 THE DEFENDANT: On at least one occasion,
20 your Honor, I acted with intention to defraud John Doe
21 1, yes.

22 THE COURT: On one occasion with respect to
23 the 14.5 million?

24 MR. BARKET: Your Honor, I'm sorry. The
25 transactions were multiple, they are complex. All of

1 the money didn't all -- wasn't all diverted in a way
2 that would have been illegal. His intent --

3 THE COURT: Well, that's what I'm trying to
4 find out.

5 MR. BARKET: I don't think it -- it is I
6 think sufficient for the purposes of the plea
7 allocution --

8 THE COURT: Please don't tell me what's
9 sufficient.

10 MR. BARKET: I'm not telling you what you
11 should accept, I'm saying what I think. In this
12 particular instance, you're asking him general
13 questions about all of the money, and the answers --
14 the question doesn't allow for a simple yes or no
15 answer to all of that.

16 THE COURT: Then you explain it to me in
17 more specific terms that you're comfortable with. But
18 to say that I took money from John Doe X and used it
19 for something is insufficient. So go ahead, tell me in
20 your own words what you did or how this fraudulent
21 transaction occurred.

22 MR. BARKET: He took --

23 THE COURT: Not you, Mr. Barket, your
24 client. He's pleading guilty.

25 MR. BARKET: He has --

1 THE COURT: I want to know what he did.

2 MR. BARKET: Judge, he's explained to you
3 what he's done. You're asking --

4 THE COURT: In such generic and general
5 terms that I don't understand it, so I want more
6 specifics.

7 MR. BARKET: We can give you more specifics
8 if you give us a moment, but he can't respond to your
9 questions the way they're being asked, in a way --
10 within the context of this plea because, frankly, to
11 work out all of these transactions took many hours,
12 many days to figure out where all the money was.

13 THE COURT: Then have him explain it in his
14 own words. And if I need more information, I'll ask.

15 THE DEFENDANT: Your Honor?

16 THE COURT: Yes.

17 THE DEFENDANT: Can I say over again, give
18 an example of a scenario with John Doe 1.

19 THE COURT: Yes, go ahead. I'd like to hear
20 what you're going to tell me.

21 THE DEFENDANT: On one occasion, I went to
22 John Doe 1. I presented him with a real estate
23 transaction in Manhattan. At the time that I -- at
24 some point in time during my conversations with him
25 about this particular transaction, I was in the Eastern

1 District of New York. I asked him for 7 million
2 dollars to do a real estate transaction, to invest in a
3 real estate transaction. I specifically gave him the
4 address, the location, et cetera, of that specific real
5 estate deal.

6 My intention while asking him for the money
7 to invest in that specific real estate deal was so that
8 I would use that money elsewhere and not for that real
9 estate deal. As such, it was my intention to defraud
10 him while ultimately, of course, I wanted to pay him
11 back. But I'm saying I used the money for something
12 different than what I represented to him.

13 THE COURT: Okay. It's charged in the
14 information, as I read it, that you told investors that
15 you would use their investment capital to purchase
16 properties in New York and New Jersey that you would
17 subsequently sell for a profit. Did you say that to
18 both John Doe 1 and 2? Is that correct?

19 THE DEFENDANT: Yes.

20 THE COURT: And did you claim that the
21 sellers of those properties would only close on the
22 real estate sales contracts after you had located a
23 purchaser who would be willing to buy the property at a
24 higher price?

25 THE DEFENDANT: No.

1 THE COURT: I'm reading right from the
2 information.

3 THE DEFENDANT: Your Honor, the substance of
4 the charge -- I'm just answering the questions
5 truthfully. I am guilty of committing 18 1343. It's
6 just not exactly how the transaction itself works. It
7 was a mistake as to how it was exactly written but it
8 doesn't speak to the substance of the charge. The
9 deals in fact existed. The bottom line is, though,
10 that I made certain representations to investors that
11 were false.

12 THE COURT: Mr. CAFFARONE, what is your
13 evidence here, because I'm having a very difficult time
14 eliciting an allocution from the defendant that's
15 satisfactory.

16 MR. CAFFARONE: Yes, your Honor. The
17 evidence is that the defendant, as stated in the
18 information, on a number of occasions represented to
19 John Doe 1 and John Doe 2 that he was going to take
20 their money and use it for particular real estate
21 investments, not just real estate generally, particular
22 addresses, told them, I'm using your money and I'm
23 going to purchase this property, and then didn't use it
24 for that purpose. He sent it to other victims to pay
25 victims from a prior Ponzi scheme or other investors.

1 He used it to gamble. He used it to donate to charity.

2 In addition, your Honor, in the course of
3 the fraud, John Doe 2 specifically -- he provided them
4 with documents, a purchase agreement that purported to
5 be a purchase agreement between the seller of a
6 property that he said he was purchasing and the
7 victims. That agreement -- we've spoken to the seller
8 of the property and he said, we didn't enter that
9 agreement, that's not our signature. Mr. Barkany had
10 contacted us months earlier about the property but we
11 haven't engaged in any negotiations. We certainly
12 haven't agreed, orally or otherwise, to sell him this
13 property.

14 In addition, in that fraud with John Doe 2,
15 he created an escrow agreement that was supposed to be
16 a third party agreement with the escrow agent that was
17 going to hold the monies until they had closed on the
18 property. So the third party escrow agent was to
19 assure that the funds only went to their intended
20 purpose, which was the purpose of the property.

21 We've contacted that third party escrow
22 agent. They have said they didn't enter into that
23 agreement, that that agreement was not their signature.
24 The monies went into an account that was controlled by
25 the defendant. The defendant created a bank account, I

1 think it was at TD Bank, and put it in the name of the
2 third party escrow agent. That wasn't the third party
3 escrow agent's account, it was the defendant's. I
4 believe during the course of a search warrant, we found
5 some of these fraudulent documents as well, in the
6 defendant's office.

7 In addition to all of that evidence, the
8 defendant, back in December --

11 MR. CAFFARONE: We found -- we talked to at
12 least two of the owners, where the owner said, this
13 deal is not -- we never made a deal to sell this
14 property to Mr. Barkany or any of the victims.

15 THE COURT: How many deals were pitched to
16 both John Doe 1 and 2?

17 MR. CAFFARONE: There were a number of deals
18 that were pitched, three to John Doe 1 and -- John Doe
19 2 had other deals unrelated to the monies that we
20 charged in the information. So there were some
21 legitimate deals within -- that Mr. Barkany had
22 actually done with some of these victims, and there are
23 some that we're just not clear -- we haven't spoken to
24 the purchaser but that are not contained here in --

25 THE COURT: But there were multiple deals

1 with John Doe 1 and John Doe 2 for real estate --

2 MR. CAFFARONE: Correct.

3 THE COURT: -- which were just bogus deals.

4 MR. CAFFARONE: Completely shammed, yes.

5 Your Honor, in addition to that evidence that I laid
6 out, in August, 2011, the defendant signed an affidavit
7 that was notarized, where he admits to defrauding John
8 Doe 1 and the other victims that were part -- that also
9 gave him money as part of the -- what I call the first
10 set of victims. We didn't include all of them in the
11 information, we only included John Doe 1.

12 In addition to the 46.5 million dollars, he
13 got another 8 million dollars from other victims. In
14 an affidavit, he admits to repeatedly engaging -- and
15 I'm quoting -- "in fraudulent and unauthorized
16 practices and conveyances which victimized the
17 creditors." He employed a variety of means in this
18 fraud, including the solicitations of funds for real
19 estate and loan transactions which, unbeknownst to
20 plaintiffs, were not as represented or altogether
21 nonexistent.

22 We had laid all this out in the complaint.
23 So that would be our evidence. I'm sure we would have
24 other evidence as well. We recovered a number of
25 records from his office that we haven't even had a

1 chance to go through. But at a minimum, that's what we
2 would have proven, had this case gone to trial or if
3 this case goes to trial.

4 THE COURT: So, Mr. Barkany, did you hear
5 the government's outline here?

6 THE DEFENDANT: Yes.

7 THE COURT: I'm having a difficult time
8 understanding why you're not able to allocute in this
9 case. Did you --

10 No, Mr. Barket, I'm not addressing you. I'm
11 addressing your client because it's him who's pleading
12 guilty, and it's necessary that he outline the fraud
13 that was engaged in and the scope of the fraud.

14 MR. BARKET: He has, your Honor.

15 THE COURT: He has not to the Court's
16 satisfaction. So when we're done, we're done.

17 MR. BARKET: You can ask more questions if
18 you like, Judge. He's happy to answer them truthfully,
19 as he has so far.

20 THE COURT: I want the defendant -- and I'm
21 going to give you your last chance because after this,
22 I'm not going to try anymore. I don't want to be
23 pulling teeth. If you're not willing to plead guilty
24 to the contours of the offense, so be it. You're
25 either going to describe what you did or I'm leaving.

1 So what did you do? I don't want -- you
2 know, it's not enough to say, well, I -- whatever you
3 said thus far was insufficient. This is a fairly large
4 scheme to defraud. You haven't really allocuted to a
5 fairly large scheme to defraud. So please, if you want
6 to say something to the Court, you should do it right
7 now.

8 THE DEFENDANT: Your Honor, may I?

9 THE COURT: Yes.

10 THE DEFENDANT: Much of what Mr. CAFFARONE
11 said in open court just now is accurate and is what
12 happened, unfortunately. Like he also mentioned,
13 there's been a tremendous amount of deals that went on
14 between my investors and myself, some of which were
15 completely legitimate and, unfortunately, many of them
16 as well that were vehicles under which I used to
17 separate money from my investors.

18 THE COURT: When you say separate money, do
19 mean you steal money, because that's what I want to
20 hear if that's what happened.

21 THE DEFENDANT: Yes. I was just quoting
22 from that thing, from that paper that he read from.

23 THE COURT: Don't use euphemisms. Separate
24 from my investors is not the same as admitting that you
25 stole money from them.

1 THE DEFENDANT: Your Honor, the truth is I'm
2 not an attorney. But what I am here to do today, and
3 it's very difficult to do it because I've been dealing
4 with this for quite a few years -- I am guilty of
5 violating this thing that I'm charged with.

6 THE COURT: What you're not understanding is
7 that I have to be satisfied that you are guilty, not
8 you. So I ask you to tell me -- and this is why we do
9 it -- to tell me the facts, tell me the actions that
10 you did, so that I can make a finding that you are in
11 fact guilty of the crime you're wishing to plead guilty
12 to, because ultimately, it becomes somewhat of a legal
13 assessment and it's the Court's responsibility to
14 insure that you're pleading guilty to a crime you
15 actually committed.

16 THE DEFENDANT: Okay.

17 THE COURT: That's why we insist on some
18 detail. So for you to say, well, I'm guilty isn't
19 adequate, or that I separated money from my investors
20 isn't adequate, because what's lacking in that is that
21 it was intentional, that it was done knowingly, that it
22 was done with the intent to defraud, to steal from your
23 investors, that you never intended to take the money
24 and put it into the investments you represented you
25 were going to do for them, and you knew that when you

1 took the money. Those are the elements that have to be
2 established, and not just for one transaction. You've
3 got a sixty-million-dollar-plus allegation here.

4 Now, I don't need you to detail all 63
5 million dollars worth of the transactions, but
6 certainly you should have enough information at your
7 disposal that you're able to say that large swaths of
8 money were taken from these investors and that the
9 moment you took their money, you either lied to them or
10 you knew you weren't going to use it for the purposes
11 that you represented or that you gave them false
12 documents to con them into giving you the money or
13 entrusting it. Those are the elements that have to be
14 allocuted to in order for me to accept this plea. So
15 all of that has to be folded into this.

16 Now, if you want time to reconsider this,
17 I'm going to call a recess now and let you think about
18 this, so that you --

19 MR. BARKET: There's no thought about
20 whether or not he wants to plead guilty. He wants to.
21 The problem arises that you're asking -- you asked him
22 specific questions that call for answers --

23 THE COURT: I'm done.

24 THE DEFENDANT: Your Honor, just to answer
25 your question, I do want to speak to my attorney first.

1 THE COURT: If you want a few minutes to get
2 an allocution together, that's fine. I asked questions
3 and then you said okay, well then -- and then I invited
4 you to come and explain it to me. I'm doing it both
5 ways. I have never taken so much time with a plea and
6 never have I been with a defendant who is so unwilling
7 to allocute and to describe the fraud. You've got a
8 63-million-dollar fraud you're charged with, and I
9 can't get any elements out of it. So I'm not sure if
10 it's because you don't want to admit to what you did.
11 If that's the case, then you shouldn't be pleading
12 guilty, okay?

13 So take ten minutes, talk to your lawyer,
14 talk to the government. You know what I'm looking for.
15 If you're not able to provide it because it's not true,
16 then don't say it. If you're not willing to say it
17 birth certificate you just prefer not to, then we'll
18 void this plea again, but you've got to think about
19 what you want to tell the Court. I'll see you at 3:30.

20 MR. CAFFARONE: Thank you.

21 (Tape off, tape on)

22 THE COURT: All right, we're back on the
23 record.

24 Mr. Barkany, do you have something you want
25 to describe to the Court?

1 THE DEFENDANT: Yes.

2 THE COURT: Okay.

3 THE DEFENDANT: On or about May 3rd of 2010
4 or just a few days before that, I spoke with John Doe
5 1, presented him with a deal at 335 Madison Avenue in
6 New York City. At the time -- most of the time I was
7 discussing with him that deal, I was in the Eastern
8 District of New York.

9 That deal, I told him I was going to be
10 going to contract on and attempting to assign it to a
11 third party for a profit. I told him that for a
12 specific amount of time, there would be a due diligence
13 period under which our deposit that we would be handing
14 to the fellow would be fully refundable. In the event
15 that we decided not to proceed with the transaction, we
16 would be able to get back our money and there was no
17 risk to us here, except for the time lost in having the
18 money available to invest elsewhere.

19 I made representations that I would be
20 entering into a contract to purchase the property, that
21 the money would be held by a third party escrow agent
22 or an attorney representing the seller, perhaps, and I
23 told him that at all times, his money would be safe and
24 secure.

25 My intention while telling him this was to

1 induce him to give me that 7 million -- to give me
2 money. My intention while telling him this was
3 twofold: One was ultimately maybe to give him back to
4 the money. But at the time that I was telling it to
5 him, I knowingly told him to give me that money while
6 knowing that that specific deal, I was not going to put
7 the money into that deal.

8 There's no way he would have given me
9 necessarily that money just by telling him that I
10 wanted to use it elsewhere or use it for my own benefit
11 or use it for gambling or use it to pay back other
12 investors, right? So he gave it to me specifically
13 because of the fact that I told him it was going to be
14 for this deal, that it was going to be under a
15 protected environment, the money, such as an escrow
16 agent or some other kind of fiduciary.

17 Additionally -- yeah, he went into the deal
18 knowing with full faith and confidence that his money
19 would be protected, and there's no way that his money
20 would ever be lost or otherwise not available to be
21 given back to him at the time that he was expecting to
22 originally receive it back. And in fact, subsequent to
23 those conversations with John Doe 1, he wired, at my
24 direction, 7 million dollars, and I subsequently
25 completely misappropriated those funds. I did not use

1 that money for the purposes of why he sent it to me,
2 and I misrepresented the facts altogether as relates to
3 my presentation to him.

4 THE COURT: With respect to John Doe 1 and
5 2, were there other transactions with those individuals
6 that you did -- made representations to those
7 individuals to secure funds from them, which at the
8 time you made the representations, you knew were false?

9 THE DEFENDANT: Yes.

10 THE COURT: And those monies that you
11 obtained under false pretenses from either John Doe 1
12 or 2, other than the one you described, were those
13 monies wire transferred to you, to your account, or to
14 an account --

15 THE DEFENDANT: Some were wire transfers,
16 sure. For the most part, nowadays, people do -- yes.

17 THE COURT: Okay. So some weren't wire
18 transfer but wire transfers were effected, correct?

19 THE DEFENDANT: Yes.

20 THE COURT: And these conversations with
21 John Doe 1 and 2, did some of those conversations or
22 transactions occur in the Eastern District of New York?

23 THE DEFENDANT: Yes.

24 THE COURT: And with respect to those other
25 transactions, did you divert the funds to other

1 purposes than what you told them the monies were going
2 to be used for.

3 THE DEFENDANT: Yes.

4 THE COURT: Mr. CAFFARONE, we've already
5 gone into the government's evidence. I think that with
6 that specificity as to the count and with his admission
7 to the general scheme, I believe there is sufficient
8 information in the allocution, but I'll hear from you.

9 MR. CAFFARONE: I agree, your Honor. The
10 government agrees that it satisfies the charged crime.

11 THE COURT: And it is the basis, as I
12 understand it, for the 63-million-dollar forfeiture, is
13 that right?

14 MR. CAFFARONE: Yes, your Honor.

15 THE COURT: All right.

16 MR. CAFFARONE: Yes. The 62 million dollars
17 is the monies that John Doe 1 (ui) gave to the
18 defendant. That's the basis for --

19 THE COURT: 62 million sorry.

20 MR. CAFFARONE: Yes.

21 THE COURT: I saw a reaction from you, Mr.
22 Barkany. What was the reaction?

23 MR. BARKET: I'm sorry, Judge?

24 THE COURT: I don't know. I thought that he
25 took exception to the government's claim that this

1 scheme that was outlined was the basis for the 62-
2 million-dollar forfeiture.

3 MR. BARKET: No, that's the basis for the
4 forfeiture.

5 THE COURT: Okay. That's all I need.

6 After hearing the defendant's allocution and
7 the government's evidence, I find that there is a
8 basis, a factual basis for the plea. I find that the
9 defendant has knowingly and voluntarily entered into
10 this plea and that he fully understands the
11 consequences and rights that he has and the
12 consequences of the plea. I therefore accept his plea
13 of guilty to the information and would recommend that
14 Judge Wexler do the same.

15 I think that should be all. Is there
16 anything else from the government?

17 MR. CAFFARONE: No, thank you.

18 THE COURT: Mr. Barket, any other
19 application?

20 MR. BARKET: No, just that I would like to
21 be present or a member of my firm be present when he's
22 interviewed by Probation.

23 THE COURT: All right. Typically, I don't
24 pass that information on to Probation. Just make sure
25 your client is aware and insists on that when he's

1 called by Probation.

2 MR. CAFFARONE: There is a form to fill out.

3 He'll check off the box that he wants to present.

4 THE COURT: I don't have a sentencing date
5 but it will provided. Typically, what Judge Wexler is,
6 he waits for the probation report and then he sets a
7 sentencing date.

8 Anything else I have to address?

9 MR. CAFFARONE: No, your Honor, thank you.

10 MR. BARKET: No, thank you.

11 THE COURT: All right, thank you.

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18 I certify that the foregoing is a correct
19 transcript from the electronic sound recording of the
20 proceedings in the above-entitled matter.

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25 ELIZABETH BARRON

September 9, 2013